



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XF100**

**National Process for Permit Applications to Retain Releasable Rehabilitated Marine Mammals for Public Display**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; response to comments.

**SUMMARY:** The National Marine Fisheries Service (NMFS) announces the availability of its final Procedural Directive clarifying the process for eligible permit applicants to obtain releasable marine mammals for public display purposes under the Marine Mammal Protection Act (MMPA). NMFS will no longer grant permits for the specific purpose of retaining releasable marine mammals for public display. Instead, applicants will now need to apply for a permit to take (collect) animals from the wild pursuant to the MMPA.

**DATES:** This final Procedural Directive will be applicable as of *[insert date of publication in the FEDERAL REGISTER]*.

**ADDRESSES:** The Procedural Directive is available in electronic form via the Internet at <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>.

**FOR FURTHER INFORMATION CONTACT:** Jaclyn Taylor, NMFS, Office of Protected Resources, (301) 427-8402, [Jaclyn.Taylor@noaa.gov](mailto:Jaclyn.Taylor@noaa.gov).

**SUPPLEMENTARY INFORMATION:** NMFS developed a national Procedural Directive clarifying the process for eligible permit applicants to obtain releasable marine mammals for public display purposes under the MMPA.

NMFS will no longer accept applications for MMPA section 104 permits that specifically seek to obtain releasable rehabilitated marine mammals for public display purposes. NMFS will instead require prospective applicants to apply for a permit authorizing actual take (collect) from the wild. In the event NMFS grants a permit for take from the wild, the NMFS OPR Director may then, at his or her discretion, require that a releasable rehabilitated marine mammal be substituted for the authorized capture from the wild, in accordance with 50 CFR 216.27.

On November 15, 2017, NMFS published the draft national Procedure for Permit Applications to Retain Releasable Rehabilitated Marine Mammals for Public Display for a 30-day public comment period (82 FR 52880). Comments received are available on regulations.gov at <https://www.regulations.gov/docket?D=NOAA-NMFS-2017-0096>. Substantive and relevant comments and NMFS' responses are included below.

### **General Comments**

*Comment 1:* Several commenters expressed support for the draft Procedural Directive, stating that it provides clarity and reflects concerns offered during public comment periods in 2010 and 2015 regarding the Office of Protected Resource's issuance of permits authorizing the acquisition of stranded, releasable California sea lions (*Zalophus californianus*) from the National Marine Mammal Health and Stranding Response Program for the purposes of public display. The commenters opined that the directive aligns more clearly with the stated goals of the Marine Mammal Health and Stranding Response Program by requiring the application for a

permit to “take” marine mammals from the wild, leaving potential sourcing of releasable marine mammals from rehabilitation facilities, appropriately, to the discretion of the Director of the Office of Protected Resources.

*Response:* NMFS acknowledges this comment and has finalized the Procedural Directive as proposed.

*Comment 2:* One commenter recommended NMFS provide additional explanation and rationale for finding that either its existing practice or the procedural directive is consistent with MMPA section 109(h)(3).

*Response:* NMFS’s rationale for both the existing practice and this Procedural Directive is described in the Additional Background and Rationale section in the Directive. The rationale outlines each of the following, which contribute to the rationale: the preamble to the 1993 proposed rule (58 FR 53320) for 50 CFR 216.27, the implementing regulations allowing the Office Director broad discretion to direct a releasable animal to be used for a MMPA section 104 purpose in lieu of being released, and the three relevant permit decisions.

*Comment 3:* One commenter stated that it is incumbent on NOAA to provide a certification that a rehabilitated animal will not carry back into the wild any communicable disease. Additionally, NOAA should ensure the released marine mammal will become part of the stock or group that it originally came from.

*Response:* The Standards for Release, as described in this Directive, provide an evaluative process to determine if a stranded marine mammal is suitable for release back to the wild in accordance with MMPA implementing regulations at 50 CFR 216.27. As part of this process the attending veterinarian reviews the animal’s complete history including all stranding

information, diagnostic test results required by NMFS, and medical and husbandry records. The goal of required diagnostic testing is to safeguard the health of wild marine mammal populations by testing for diseases that pose a significant morbidity or mortality risk to wild populations.

With regards to the released animal becoming part of the stock or group that it originally came from, the Standards for Release specify that rehabilitated animals should be released in a location and at a time of year to maintain stock fidelity and ensure proximity to conspecifics.

*Comment 4:* One commenter objected to the draft Directive, suggesting NMFS instead propose a new process that is compatible with the principles of the MMPA and is reasonably targeted to and appropriate for rehabilitated marine mammals deemed releasable.

*Response:* NMFS believes that this Procedural Directive is compatible with the principles of the MMPA. The purpose of this Procedural Directive is to explain that NMFS will no longer accept applications that specifically seek to obtain releasable rehabilitated marine mammals, which, as described in the Directive, is consistent with the goals of both the MMPA's stranding response mandate and the public display permit provisions.

#### *Procedural Directive Scope*

*Comment 5:* One commenter recommended that NMFS clarify how it is defining the term "feasible" in the context of section 109(h)(3) of the MMPA—*e.g.*, does it mean that release can be accomplished, or that release is reasonable or sensible given the entirety of the facts of the particular situation? Specifically, NMFS should explain the basis for concluding that the issuance of a permit under section 104(c) somehow overrides the release mandate under section 109(h).

*Response:* The MMPA implementing regulations at 50 CFR 216.27 allow the Office

Director broad discretion to direct that a rehabilitated animal to be used for a MMPA section 104 purpose in lieu of being released. As described in the Directive, the preamble to the 1993 proposed rule addressed the “feasibility” determination. Contrary to the commenter’s suggestion, NMFS has not concluded in this Directive that issuance of a permit under section 104 “overrides” the release mandate under section 109(h). In fact, this directive is intended to separate “takes” for public display purposes (which are permitted under section 104) from the rehabilitation-and-release objectives of section 109(h), while still retaining the Office Director’s discretion, as provided by the regulations, to direct a substitution in certain circumstances not enumerated in this directive.

As for the commenter’s other questions regarding the releasability determination, as noted above, NMFS has established an evaluative process (the Standards for Release) to determine if a marine mammal is suitable for release back to the wild.

*Comment 6:* One commenter expressed support for NMFS’s proposal to strengthen its analysis of population effects of retaining a releasable marine mammal as part of its permit application review. The commenter questioned whether similar scrutiny needs to be given to all aspects of a permit authorizing the removal of a marine mammal from the wild, if what the applicant is seeking or what NMFS plans to grant is authority to retain a releasable animal and not to remove animals from the wild population. The commenter recommended that NMFS clarify whether all of the information identified in the application instructions must be provided if the applicant is seeking a removal permit only as a means to obtain releasable rehabilitated animals and whether all of those details will be reflected in the requirements of the permit.

*Response:* The purpose of this Procedural Directive is to explain that NMFS will no

longer accept applications that specifically seek to obtain releasable rehabilitated marine mammals. Applicants will be instructed to submit “take from the wild” permit applications with all required information for that take activity included in the permit application. If such permit is issued, the Office Director, in his or her sole discretion, will be responsible for the decision as to whether a releasable rehabilitated animal be substituted for a take from the wild, depending on the circumstances before the Office Director at the time. This Procedural Directive is not intended to prescribe the situations, if any, in which the Office Director would in fact choose to exercise that discretion.

*Comment 7:* One commenter recommended that NMFS provide additional guidance on what releasable marine mammals can be used in place of animals authorized to be removed from the wild under the associated public display permit.

*Response:* As noted above and in the Procedural Directive itself, the purpose of this Directive is to explain that NMFS will no longer accept permit applications seeking to obtain releasable marine mammals from the stranding network. The Directive is not intended to prescribe criteria for what situations, if any, the Office Director would in fact exercise their discretion to direct a releasable rehabilitated animal be used for a MMPA section 104 purpose in lieu of being released.

*Comment 8:* One commenter recommended that the procedural directive be expanded to address the roles, rights, and responsibilities of rehabilitation facilities in implementing this policy. The district court in *IMMS v. NMFS*, No. 1:11CV318-LG-JMR (S.D.Miss.2014) found that NMFS could not delegate its authority to the rehabilitation facility to determine when releasable marine mammals are sent to a public display facility under NMFS’ regulations.

However, the court did not go so far as to say that the rehabilitation facility has no role in this process, provided that NMFS retains the ultimate decision-making authority.

*Response:* As noted above, the purpose of this Procedural Directive is to explain NMFS will no longer accept permit applications seeking to obtain releasable marine mammals from the stranding network. The Directive is not intended to prescribe criteria for what situations, if any, the Office Director would in fact exercise their discretion to direct a releasable rehabilitated animal be used for a MMPA section 104 purpose in lieu of being released.

*Comment 9:* One commenter stated that allowing a public display facility to substitute a stranded releasable marine mammal instead of “taking” from the wild is consistent with the requirements of the MMPA and should not be left to the discretion of the Agency.

*Response:* As noted above, NMFS’ regulations at 50 CFR 216.27 allow the Office Director (as opposed to permittees or rehabilitation facilities) broad discretion to direct that a rehabilitated animal to be used for a MMPA section 104 purpose in lieu of being released.

*Comment 10:* One commenter expressed concern that the Proposed Directive would make it nearly impossible for a public display facility to obtain a releasable marine mammal under any circumstances because it would expose both the agency and the facility to the very likely risk of costly litigation initiated by those who oppose any animals in human care.

*Response:* The MMPA section 104 allows for permits to be issued for “take” of marine mammals for public display purposes provided that the applicant meets the issuance criteria as outlined in NMFS implementing regulations (50 CFR Part 216, Subpart D). As noted above, NMFS’ regulations at 50 CFR 216.27 allow the Office Director broad discretion to direct that a rehabilitated animal to be used for a MMPA section 104 purpose (*e.g.*, a permitted use) in lieu of

being released.

#### *MMPA Permit Application Process*

*Comment 11:* Several commenters expressed concern that the process set forth in the Directive (requiring prospective applicants to submit “take from the wild” permit applications) would be burdensome because it would require preparation of an Environmental Assessment and/or an Environmental Impact Statement under the National Environmental Policy Act (NEPA).

*Response:* All MMPA permits require appropriate analysis under NEPA. Environmental Assessments were prepared for the three permits NOAA issued authorizing the retention of releasable marine mammals.

*Comment 12:* A commenter expressed concern that requiring a zoo, aquarium or marine park that is only interested in retaining a releasable marine mammal to respond to a multitude of capture from the wild questions that fail to assess the suitability of the specific request to retain a releasable marine mammal would impose a regulatory burden that is unreasonable and unrelated to the best interests of the animal or the environment. The commenter also commented that requirements, as described in the Application Instructions and Supplemental Information for Public Display Permits under the MMPA (OMB No. 0648-0084), do not make sense with respect to a stranded and rehabilitated animal.

*Response:* The purpose of this Procedural Directive is to explain that NMFS will no longer accept applications that specifically seek to obtain releasable rehabilitated marine mammals. Applicants will be instructed to submit “take from the wild” permit applications with all required information for that take activity included in the permit application, as described in



the Application Instructions and Supplemental Information for Public Display Permits under the MMPA (OMB No. 0648-0084).

The applications for the three permits NOAA issued authorizing the retention of releasable marine mammals followed the Application Instructions and Supplemental Information for Public Display Permits under the MMPA (OMB No. 0648-0084). These applications addressed all the applicable questions including the status of the affected stocks and the anticipated impacts on the species or stocks. Given that these applications did not propose directly capturing marine mammals from the wild, the applications referenced the authority of the stranding network and their procedures when addressing the questions specifically related to capture from the wild. Under this Procedural Directive, permit applications will continue to address the status of the species and the impacts of the removal of the desired number of animals from the stock or population.

#### *Non-Releasable Rehabilitated Marine Mammals*

*Comment 14:* One commenter recommended NMFS ensure the wording of this procedural directive adequately take into account the practice of declaring healthy ice seals non-releasable if they are removed from their home range for rehabilitation per NOAA's agreement with co-management groups.

*Response:* This Procedural Directive does not affect NMFS's process for making release determinations and the placement process for non-releasable marine mammals. Additional text was added to the Directive to clarify.

Dated: May 1, 2018.

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[FR Doc. 2018-09611 Filed: 5/4/2018 8:45 am; Publication Date: 5/7/2018]